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Topic: PROBATION REVOCATION

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## JUDICIAL PROCEDURE IN PROBATION REVOCATION UNDER THE NEW TRIAL PROCEDURE LAW

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The new Trial Procedure Act, effective July 1, 1978 (see pp. 119-125 of 1977 Supplement to G.S. Vol. IC), will make changes in the procedure for considering revocation of probation. (Some of these changes should already be in effect because they are required by U.S. Supreme Court decisions.) Under the Act, probation may be imposed unless the offense is punishable by death or a mandatory life sentence [G.S. 15A-1341(a)]. Probation may be either "unsupervised" (suspended sentence without probation supervision) or "supervised" (suspended with probation supervision) [G.S. 15A-1341(b)]. It should be noted that the Act modified what the court may impose as conditions of probation. For example, the "avoid vicious or injurious habits" condition [former G.S. 15-199(1)] has been deleted, and the condition that the probationer submit to warrantless searches has been limited to searches by a probation officer, in the probationer's presence, "for purposes reasonably related to his probation supervision" [G.S. 15A-1343(b)].

The Criminal Code Commission is now considering some amendments to the Trial Procedure Act which may be enacted by the General Assembly before the Act goes into effect. These amendments are mentioned, where relevant, in the remainder of this memo.

### I. JURISDICTION TO REVOKE, MODIFY, REDUCE, EXTEND, OR TERMINATE PROBATION

Jurisdiction to revoke, modify, reduce, extend, or terminate probation is limited to the superior or district court division, whichever originally imposed probation. It is shared by the courts of the districts (1) where probation was originally imposed, (2) where the probationer presently resides, and (3) where he allegedly violated probation [G.S. 15A-1344(a)]. But if the probation is unsupervised, the judge who originally imposes



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it may limit jurisdiction to alter or revoke the probation to himself; if he is no longer on the bench, any judge of the court where the defendant was sentenced has such jurisdiction [G.S. 15A-1344(b)]. Note that the Act does not authorize the original judge to limit jurisdiction with regard to (1) issuance of an order for arrest for probation violation (see Section II below) and (2) preliminary hearing in a probation revocation proceeding (see Section III).

The court in the district where the alleged violation occurred may on its own motion transfer a revocation, modification, reduction, extension, or termination proceeding to either the district of residence or the district where probation was originally imposed [G.S. 15A-1344(c)]. The district attorney of the district where probation was imposed must be given reasonable notice if any such proceeding is to be held in any other district [G.S. 15A-1344(a)].

## II. INITIATING REVOCATION PROCEEDING

Ordinarily a proceeding to revoke probation is begun by the probation officer, but presumably it may also be initiated by the court. An arrest is not necessary to begin the proceeding; the probationer may simply be given at least 24 hours notice of the revocation hearing and its purpose, along with a written statement of his alleged violations, and told to appear at the hearing [G.S. 15A-1345(a), (e); Morrissey v. Brewer, 408 U.S. 471, (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973)].

If the probationer is to be arrested, the probation officer may apply to any judicial official (magistrate, clerk of superior court, or judge) for an order for arrest for probation violation [G.S. 15A-1345(a), -305(d), -304(f)]. Since the Fourth Amendment applies to arrest of probationers. [Martin v. United States, 183 F. 2d 436 (4th Cir. 1950)], that judicial official should determine whether there is probable cause to believe that the probationer violated conditions--not merely relying on the probation officer's conclusions but also checking the officer's information. Thus, the judicial official should follow the procedure of G.S. 15A-304(d) for issuing arrest warrants.

Following his arrest for violation, the probationer has a statutory right to bail. Bail conditions must be set by a judicial official after the arrest, just as they are when a person is arrested for a crime [G.S. 15A-1345(b), -534]. A judge who issues an order for arrest for probation violation should not attempt to "pre-set" bail conditions before the arrest is made.

It is good practice to notify the district attorney's office in advance of all court hearings concerning revocation. [A proposed amendment to the Trial Procedure Act would require reasonable notice to the district attorney of the district where probation was imposed, of any hearing to "substantially modify" probation.]

## III. PRELIMINARY HEARING

When a probationer is held in custody in connection with revocation proceedings, a preliminary hearing is required by Supreme Court decisions (Morrissey and Gagnon, supra) that are incorporated in G.S. 15A-1345(c). The preliminary hearing is not required if (1) the probationer waives his right to it [G.S. 15A-1345(c)], (2) the revocation hearing is held within four days after arrest [G.S. 15A-1345(c)], (3) the probationer is free on bail or recognizance pending the revocation hearing [ State. v. Webb, 31 N.C. App. 691 (1976); United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976], (4) the probationer is never arrested but is merely notified of his revocation hearing [ United States v. Strada, 503 F.2d 1081 (8th Cir. 1974)], or (5) the probationer is incarcerated for a new crime [ United States v. Tucker, 524 F.2d 77 (5th Cir. 1975), cert. denied, 424 U.S. 966 (1976)].

The preliminary hearing must be held within five working days of the probationer's arrest or he must be released to continue on probation [G.S. 15A-1345(c)]. Before the preliminary hearing, the probationer must be given notice of the time, place, and purpose of the hearing, and his alleged violations [G.S. 15A-1345(d)]. The new Act provides that the hearing may be held by any judge in the county where the probationer was arrested or where probation was originally imposed or, if no judgment is sitting in that county, then anywhere in the judicial district [G.S. 15A-1345(d)]. However, the U.S. Supreme Court ruled that the hearing must be held "at or reasonably near the place of the alleged . . . violation or arrest" (Morrissey, supra, at 485; Gagnon, supra). Consider a case in which probation was imposed in District A, the probationer later moved to District B, then violated probation in District B, and was arrested in District C. To comply with the U.S. Supreme Court's holding, the preliminary hearing would have to be held in either District B or C, but G.S. 15A-1345(d) requires that it be held in either District A or C. In this unusual situation, where the district of violation is neither the district where probation was imposed nor the district where the probationer is arrested for his violation, the hearing should be held in District C (the district of arrest) to comply with the Supreme Court's ruling. [A proposed amendment to the new Act would direct that the preliminary hearing be held either in the district where probation was imposed or the district of arrest.]

The purpose of the preliminary hearing is to determine whether probable cause exists to believe that the probationer violated conditions; if probable cause is not found, he must be released to continue on probation. The hearing is informal; formal rules of evidence do not apply. The probationer may speak in his own behalf, present relevant information including witnesses, and question adverse informants unless the court finds good cause for not allowing confrontation. The judge must summarize in writing the reasons for his determination and the evidence he relies on [G.S. 15A-1345(d); Morrissey; Gagnon].

The Supreme Court held that the probationer has a right to appointed counsel at the preliminary hearing if he is indigent and (1) he denies violating probation, or (2) he admits the violation, but either there are

complex mitigating factors or he cannot speak effectively for himself (Gagnon, supra, at 790-91). The Trial Procedure Act does not mention this right. Of course, the probationer also may be represented by privately paid counsel.

## IV. REVOCATION HEARING

Before probation can be revoked, a hearing is required unless the probationer waives his right to it. The probationer must be given at least 24 hours notice of the place, time, and purpose of the hearing [the new law repeals the former seven-day notice requirement of G.S. 15-200.1]; he must also receive written notice of his alleged violations [Morrissey, supra, at 488-89; G.S. 15A-1345(e)]. The new statute sets no time limit for holding the hearing, but the Supreme Court said a "lapse of two months [between arrest and revocation hearing] . . . would not appear to be unreasonable" (Morrissey, supra, at 488). Obviously, it would be desirable to hold the hearing much sooner than two months after the arrest, especially if the probationer is being held in jail.

The purpose of the hearing, of course, is to determine whether the probationer violated probation conditions and whether probation should be revoked. The court must summarize in writing the reasons for its determination and the evidence it relies on. Evidence against the probationer must be disclosed to him; he may appear, speak in his own behalf, present relevant information including witnesses, and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel and, if indigent, to have counsel appointed. The hearing is informal and formal rules of evidence do not apply; however, North Carolina courts have held that a revocation cannot be based primarily on hearsay or solely on evidence inadmissible at a prior criminal trial [State v. Hewett, 270 N.C. 348 (1967); State v. McMilliam, 243 N.C. 775 (1956)]. The "record or recollection" of evidence at the preliminary hearing is inadmissible at the revocation hearing. [G.S. 15A-1345(e); Morrissey; Gagnon.] The verified report of the probation officer is admissible if the probation officer is present to testify [State v. Langley, 3 N.C. App. 189 (1968); State v. Duncan, 270 N.C. 241 (1967)].

G.S. 15A-1345(e) provides that if the alleged probation violation is the nonpayment of a fine or costs [which include court and appointed counsel costs under G.S. 15A-1343(b)(14)], "the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of fine." Apparently this means that the probationer must have an opportunity to show that he was unable to pay the fine or costs despite a good faith effort, and that if he does make such a showing, his probation may not be revoked.

If the court finds that the probationer has violated a condition of probation, it may do the following things: (1) continue probation; (2) modify probation conditions or extend probation up to the five-year limit [G.S. 15A-1342(a)]; (3) activate the full suspended sentence; (4) reduce the suspended sentence and then activate it [G.S. 15A-1344(d)]; or (5) impose special probation ("split sentence") [G.S. 15A-1344(e), -1351(a);

note that the new special probation law is somewhat different from the former G.S. 15-197.1]. If the court activates the full or reduced suspended sentence, it may, if the probationer is still under 21, commit him as a committed youthful offender (G.S. 148-49.14, 1977 Supp.). Normally the activated suspended sentence runs concurrently with any sentence the revoked probationer may also be serving. G.S. 15A-1344(d) appears to change the North Carolina rule that the revoking judge has no power to make the activiated sentence run consecutively to another sentence already being served [ State v. Byrd, 23 N.C. App. 63 (1974); In re Hodges, 238 N.C. 746 (1953)], because the statute says that the activated sentence runs concurrently "unless the revoking judge specifies that it is to run consecutively with the other period."

## V. REVOCATION AFTER PROBATION HAS EXPIRED

Although probation cannot normally be revoked after the period of probation has expired, it may be in two situations: 91) when the probationer violates his probation and then "absconds" or cannot be found; and (2) when the probationer is charged with a new crime and it appears the new charge will not be tried until the probation period expires. In situation 1, the Act provides that the court may revoke probation after the probation period expires if the state, before expiration, files a written motion with the clerk indicating its intent to conduct a revocation hearing, and the court finds that the state has made a reasonable effort to notify the probationer and to conduct the hearing earlier [G.S. 15A-1344(f)]. North Carolina case law indicates that a "reasonable effort" can be established by the fact that an order for arrest for probation violation was sought and issued before the period of probation expired, and that the order was returned unserved by the sheriff after diligent search for the probationer [ State v. Best, 10 N.C. App. 61 (1970); State v. Pelley, 221 N.C. 487 (1942); 43 N.C.A.G. 353 (1974)]. In situation 2, the probationer has not disappeared but the usual practice (and the policy of the Department of Correction) is to wait until the new criminal charge is disposed of before completing revocation proceedings. There are two possibilities in situation 2. One is to extend the probation period if it is less than the maximum five years (the procedure for extension is described in Section VII below). The other is to follow the procedure of G.S. 15A-1344(f): Before the probation period expires, the state files a motion with the clerk indicating its intent to seek revocation and the probation officer obtains a court order for arrest for probation violation. If the new criminal charge is not disposed of by the time the revocation hearing is held, the hearing can simply be continued.

## VI. APPEAL OF PROBATION REVOCATION

G.S. 15A-1347 provides for appeal of revocation from district court to superior court for a de novo hearing. This statute continues the procedure authorized under G.S. 15-200.1 (which the new Act repeals) with an important change. Rather than being required to enforce the district court's judgment if it finds that conditions were violated, the superior court will have the "same authority" it would have if the revocation hearing were held before it "in the first instance" [G.S. 15A-1347]: if it finds a violation, it may continue, modify, or revoke probation; and if it revokes, may activate

the full or reduced suspended sentence or impose special probation (see Section IV above). [A proposed amendment to the new Act would have this effect: if the superior court continued or modified probation after a de novo revocation hearing, the probation would become a superior court (rather than district court) probationer from then on.]

When the superior court revokes probation and activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from district court, the probationer may appeal to the Court of Appeals [G.S. 15A-1347; G.S. 7A-27(b)].

## VII. EXTENSION OF THE PROBATION PERIOD

The new Act provides that the probation period may be extended up to the five-year maximum [G.S. 15A-1342(a)], "after notice and hearing and for good cause shown," except that the hearing may be held without the probationer present if a reasonable effort to notify him has been made [G.S. 15A-1344(d)]. Otherwise, the hearing to extend probation is exactly like the revocation hearing described in Section IV above [G.S. 15A-1345(e)]. For example, the probationer has a right to counsel and, if indigent, to appointed counsel.